

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Second Periodic Review of the)	MB Docket No. 03-15
Commission's Rules and Policies)	
Affecting the Conversion)	RM 9832
To Digital Television)	
)	
Public Interest Obligations of TV)	MM Docket No. 99-360
Broadcast Licensees)	
)	
Children's Television Obligations of)	MM Docket No. 00-167
Digital Television Broadcasters)	
)	
Standardized and Enhanced Disclosure)	MM Docket No. 00-168
Requirements for Television Broadcast Licensee)	
Public Interest Obligations)	

**REPLY COMMENTS OF THE NATIONAL CABLE
& TELECOMMUNICATIONS ASSOCIATION**

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The National Cable & Telecommunications Association ("NCTA"), by its attorneys,
hereby submits its reply comments in the above-captioned proceeding.

INTRODUCTION

NCTA's Comments in this DTV Periodic Review showed that cable operators are rapidly rolling out digital services. Cable operators are using their privately-constructed digital bandwidth to offer a wide range of digital video services, including high definition ("HD") programming in more than a hundred television markets in the United States.

Some commenters nonetheless try to shift responsibility by portraying the cable industry as an obstacle to the broadcasters' digital transition. And they argue that requiring cable carriage

of digital broadcast signals, in addition to analog signals, is necessary to assist the broadcast industry during the transition and, ultimately, to expedite the transition's end. Government-mandated dual carriage during the transition, however, is not the solution to the digital broadcast transition. Nor would forced carriage of digital broadcast signals hasten the day when the government can expect to retrieve spectrum.

The Balanced Budget Act's tests dictate when that day will come. And, as NCTA's Comments demonstrated, it will not occur until *over-the-air viewers* have the means to receive and view digital broadcast signals on their television sets. It's clear from their comments that some broadcasters are concerned primarily with reaching cable viewers and do not much care about whether over-the-air viewers are ever able to view their digital signals. But they fail to explain how the transition can end before over-the-air viewers are equipped to view digital signals. And they fail to show how mandatory carriage of digital signals during the transition will help make such signals accessible to over-the-air viewers.

While the "85 percent" test is not free from ambiguity, the Commission can reasonably interpret it in a way that makes it easier rather than harder to meet. Several broadcasters who commented agree with that approach. Those that do not fail to explain how interpreting the test more stringently will do anything other than *prolong* the transition.

In order to ensure that the transition can end smoothly, the Commission should maintain rules and policies – such as the current simulcasting obligation – that help viewers switch from viewing analog programming to viewing digital programming with a minimum of disruption. Advocates urging relaxation of the simulcasting requirement fail to show how a second distinct digital programming service will do anything but frustrate that important goal.

DISCUSSION

I. DIGITAL MUST CARRY DURING THE TRANSITION WOULD NOT HASTEN RETURN OF THE ANALOG SPECTRUM

Most of the commenters in this proceeding highlight the technical and operational challenges that remain for broadcast stations to make their digital signals widely available over-the-air. Some commenters, however, use this proceeding as another avenue on which to continue their campaign for dual must carry. They try to justify this request for additional mandated access to cable systems by invoking the government's interest in getting back the second channel of spectrum that it gave to broadcasters. They argue that it will expedite broadcast provision of digital programming and hasten the transition's end. No logic or basis supports these arguments.

The Commission tentatively concluded that a dual carriage requirement would be unconstitutional. NCTA has shown previously why this decision is correct – and a principal reason is that dual must carry and multicast must carry would not serve any of the statutory purposes of must carry, as identified by the Supreme Court in *Turner*.¹ Allegations that digital must carry would serve the newly created purpose of hastening the analog spectrum's return do nothing to remedy the constitutional problems, because Congress never justified must carry on this basis. But even if it had, digital must carry, as we have repeatedly shown, would do nothing to advance this goal. Instead, it would give broadcasters even less incentive to create compelling digital content, thus prolonging the transition period. Nothing in the comments of the must carry proponents demonstrates otherwise.

¹ See, e.g., NCTA Comments and Reply Comments, Docket No. 98-120 (filed June 11, 2001 and Aug. 16, 2001). See also Comments of Courtroom Television Networks LLC at 13-17; Comments of A&E Television Networks at 10-12.

A. The Timetable for Ending the Digital Transition is Unrelated to Dual Must Carry

Some commenters seek to justify dual must carry on the ground that cable carriage is necessary to reach the 85 percent threshold for return of the analog spectrum. For example, The Association of Public Television Stations, the Corporation for Public Broadcasting and the Public Broadcasting Service (“PTV”) calculate that “with close to 70 percent of American homes equipped with cable, it is a mathematical impossibility that the country will achieve the 85 percent digital penetration required for the digital transition to be complete without cable carrying broadcasters’ digital signals in the *interim*.”² MSTV and NAB similarly argue that “the statutory criteria established by Congress for extending the DTV transition make cable carriage of digital signals *during the transition* essential. . . . Without a requirement that cable systems must carry the broadcast digital signals of local stations during the DTV transition, the 85% benchmark will be unachievable in all or virtually all circumstances.”³ These claims fail to withstand scrutiny.

Carriage of both an analog and a digital signal from the same broadcaster is unnecessary to satisfy the 85 percent test. As NCTA’s Comments established, cable carriage of a digital signal from each broadcaster will not be an issue at the end of the transition. Once a significant number of over-the-air viewers have obtained the necessary equipment to receive digital broadcast signals so that, with the addition of cable subscribers, the 85 percent test is met in most

² PTV Comments at 20 (emphasis supplied).

³ Comments of the Association for Maximum Service Television, Inc. and the National Association of Broadcasters at 26 (emphasis in original) (hereinafter “MSTV/NAB Comments”).

communities, cable operators will be ready to substitute digital broadcast signals for the analog signals being carried.⁴

Cable customers, *unlike over-the-air viewers*, will continue to be able to view television on their analog sets through, among other options, leasing a digital-to-analog converter device from their cable operator.⁵ *The real issue relating to the pace of the transition is how quickly non-cable customers will embrace new digital technology.* As NCTA's comments showed, *half* of all households that cable does *not* serve must obtain new television sets with digital tuners or digital-to-analog equipment in order for the transition's end to be reached under the 85 percent test. To make that a reality, one of the biggest challenges is development of an affordable digital-to-analog device so that the eighty million analog television sets not connected to cable or DBS can receive over-the-air broadcast digital signals.

The Comments of the Civil Rights Organizations highlight the importance of the widespread availability of such a low-cost device for over-the-air viewers. Their comments detail how most customers that do not subscribe to cable or DBS are low income families that may lack the means to purchase a new DTV set or an expensive converter device. They urge that the "Commission should hold that DTV receivers and converters are not 'generally available' until they are generally affordable – that is, until their price declines to the point where

⁴ We agree with the comments of National Broadcasting Company, Inc. and Telemundo Group, Inc., that final preparations necessary for full digital operations may take some months. Comments of NBC/Telemundo at 6. Accordingly, the Commission should give notice to all involved that analog operations will cease some time prior to the actual return of the analog spectrum by all broadcasters in a market.

⁵ Motorola's Comments establish that "regardless of how the Commission defines ["digital-to-analog converter"], the important point is that the cable industry and their suppliers have already developed and deployed, and are increasingly promoting (both for lease and for retail purchase), customer set-top equipment that will qualify under any possible definition." Comments of Motorola Inc. at 9.

a person on a modest fixed income can afford it.”⁶ Many other commenters agree that the focus must be on ensuring that over-the-air viewers are not stranded when the transition ends.⁷

Arguments about dual carriage on cable systems, therefore, are simply a diversion from the real issue at hand – the continued availability of over-the-air television to millions of *non-cable* customers. Once that *real* problem is solved, the provision of digital broadcast service to cable customers will not impede the analog spectrum’s return.

B. Dual Carriage During the Transition Will Not Help Broadcasters Serve Over-the-Air Viewers

Some commenters persist in arguing that a dual must carry requirement during the transition is somehow necessary to provide additional help to broadcasters. They argue that the transition to digital television is an expensive proposition, and they look to the cable industry to assume responsibility for their investment.

The broadcast industry, of course, sought this additional spectrum. And it insisted that high definition digital broadcasting was the reason broadcasters needed an additional 6 MHz swath.⁸ The cable industry has made its own investment, now more than \$75 billion, in the digital future.

⁶ Comments of Civil Rights Organizations at 3. See also WHYY, Inc. Comments (“The easy availability of inexpensive converter boxes is essential to the transition.”).

⁷ See, e.g., Comments of Paxson Communications Corp. at 16-17 (“the Commission’s focus clearly must be on maximizing the number of viewers capable of receiving DTV signals over the air with a DTV tuner or DTV to analog converter. In enacting 309(j)(14)(B)(iii), Congress was primarily concerned with how many viewers could receive over-the-air broadcast signals and that must be the Commission’s only concern as well.”); Comments of Block Communications, Inc. at 3 (“Given Congress’s primary concern with fostering viewers’ ability to receive over-the-air DTV signals, and the fact that over 30% of televisions in use receive only over-the-air signals, the Commission must avoid construing the 15% Test in a way that ends the transition before the vast majority of viewers are able to view DTV signals.”); Comments of Belo Corp. at 4 (“to expedite the DTV transition, the Commission must develop a plan to ensure that, whenever the transition does end, the millions of existing analog television sets are capable of displaying digital signals”).

⁸ An NAB executive said at the time that television stations “will use this spectrum for HDTV, pure and simple.” Neil Hickey, “What’s At Stake in the Spectrum War?”, Columbia Journalism Review, July/Aug. 1996 (quoting Jim May).

Paxson Communications Corp., though, complains that cable operators are somehow failing to “carry their own weight” in the broadcasters’ digital transition,⁹ and therefore proposes to extract from operators the capacity to carry multicast digital broadcast streams on a digital tier in addition to analog capacity for its “flagship channel.”¹⁰

Paxson claims that mandatory cable carriage “is the regulatory option with the greatest potential to move the transition forward quickly.”¹¹ But its comments fail to match its rhetoric. Paxson provides no reason to believe that its proposal would “move the transition forward” an inch. Forcing cable capacity to be filled up with multicast digital broadcast services, regardless of their marketplace appeal, will in no way hasten the day when more cable customers choose digital cable service. Nor will such a free ride provide Paxson any incentive to develop services that might appeal to over-the-air viewers.

In contrast to Paxson’s intense interest in using its multicast digital streams to reach *cable* customers, Paxson, in fact, appears to have little interest in providing multiple digital channels to *over-the-air* viewers.¹² Its business plans appear to be not at all directed at over-the-air homes. Thus, Paxson asserts that if “the Commission rejects multicast must-carry, broadcasters should be given a year to determine the appropriate business plans to take advantage of *what little market for over-the-air DTV services exists*.” It claims that “this course will not harm viewers, who by and large have no ability at this point to utilize over-the-air DTV

⁹ Paxson Comments at 2.

¹⁰ *Id.* at 13.

¹¹ *Id.* at 10.

¹² Its comments propose numerous Commission actions that would allow it to abandon its service to over-the-air viewers – by auctioning its broadcast spectrum to encourage “band-clearing,” by permitting it to avoid building digital facilities until the end of the transition, or by allowing it to continue to provide digital programming for only a fraction of the day on its digital stations. *Id.* at 26-29, 41.

broadcast services, but it will significantly aid broadcasters who will *save significant operating costs that presently offer no return.*”¹³

But broadcasters were given their spectrum to serve over-the-air viewers. If Paxson is so intent on creating more cable program networks, it should abandon its spectrum and compete for carriage on equal footing with the hundreds of other cable program networks that have no alternative pathway into the home – and no guaranteed must carry access to cable systems.¹⁴

The PTV comments¹⁵ similarly recycle PTV’s so-called “transitional carriage proposal,” arguing that failure to mandate dual carriage of multicast signals will delay the transition.¹⁶ NCTA has already responded to this proposal, demonstrating that as to its impact on cable, it is neither “transitional” nor “limited.”¹⁷ Instead, it would impose significant burdens on cable operators, programmers and viewers for an indefinite period.

There is equally no merit to PTV’s claim that “without transitional digital carriage rules, public television stations face an indefinite period of transmission in which licensees must operate two stations at once with all the attendant electricity and operating costs.”¹⁸ This argument suffers from a fundamental flaw: PTV fails to explain how cable carriage *during* the transition is the solution to this supposed problem. Unless PTV intends to return its analog

¹³ *Id.* at 45 (emphasis supplied).

¹⁴ PaxTV, in fact, operates as a cable network in areas in which it is not broadcast over-the-air.

¹⁵ PTV Comments at 17.

¹⁶ Of course, the transition has not yet begun for more than half of the nation’s public TV stations. PTV Comments at 9 (188 PTV stations have sought extension of May 1, 2003 DTV construction deadline).

¹⁷ Letter from Daniel L. Brenner to the Honorable Michael K. Powell, CS Docket No. 98-120 (dated Mar. 20, 2003).

¹⁸ PTV Comments at 18.

spectrum even before the 85 percent test is met, there is simply no logic to its cable carriage argument.¹⁹

PTV also claims “full multicast carriage” during the transition is “essential in order for public television stations to achieve economic health in a challenging media environment.”²⁰ The public stations assert that “national underwriters look for a minimum of 70 percent coverage before they will provide financial support for public television programming.”²¹ Even accepting this claim at face value, there are several flaws in PTV’s argument that cable carriage is the critical component of any multicast plan.²²

PTV already has been given digital spectrum to reach 100 percent of its audience over-the-air. The spectrum was not given so that public stations could turn themselves into multichannel *cable* programmers – and government-favored ones at that. Moreover, mandatory cable carriage is not enough to get them the coverage they claim necessary. While digital box penetration has increased, it still remains well below the 70 percent threshold PTV argues is critical to its program development funding.²³

Moreover, marketplace developments argue against adoption of any dual must carry requirement during the transition. Public television has been at the forefront of providing HD programming. Cable operators are committed to offering this type of compelling digital

¹⁹ Even if PTV were to choose this course, cable systems will not be an impediment to carriage. FCC rules permit certain analog stations to transition early and opt to provide an analog version of their digital signal to the cable system. See Carriage of Digital Television Broadcast Signals, 16 FCC Rcd. 2598, 2630 (2001).

²⁰ PTV Comments at 21.

²¹ Id.

²² As PTV’s comments point out, state budget crises and current economic conditions make it difficult for public television stations to obtain funding to even construct digital stations and “to provide the kind of quality digital programming the public has grown to expect.” Id. at 10.

²³ Nationwide, cable operators serve approximately 20 million digital cable subscribers.

programming to their customers.²⁴ Indeed, many PTV stations offering HD are already being carried throughout the United States.²⁵ Thus, there is clear marketplace evidence that the creation of compelling HD content will likely spur carriage during the transition.

* * *

The jury is still out regarding over-the-air viewers' interest in obtaining new digital TV sets or digital-to-analog converters so that they can view broadcasters' multicast standard definition digital broadcast programming. What is beyond dispute is that forcing cable carriage of broadcast digital services will not speed the transition for cable customers – and cannot hasten the end of the digital transition. Instead, mandatory carriage will insulate broadcasters from the need to develop programming that responds to interests of the market, thus prolonging the day when over-the-air viewers will have an incentive to invest in the equipment necessary to view digital broadcast signals.

C. Cable is Facilitating, Not Hindering, the Transition to Digital Television

Cable operators have offered customers digital cable programming for many years. More recently, cable operators and programmers have launched high definition service in many of their upgraded systems. It is therefore incorrect to claim, as some commenters do, that a supposed lack of cable carriage of HD programming is an obstacle to the DTV transition.²⁶ The facts, as detailed in NCTA's Comments, show otherwise. Cable operators throughout the nation

²⁴ See Letter from Robert Sachs to FCC Chairman Michael Powell, dated May 1, 2002.

²⁵ As of March 2003, public television digital stations were carried by cable in the following markets: New York, Los Angeles, Philadelphia, Boston, Washington D.C., Detroit, Houston, Minneapolis-St. Paul, Phoenix, Orlando-Daytona Beach-Melbourne, San Diego, Charlotte, Raleigh-Durham, Milwaukee, Kansas City, Harrisburg, Louisville, Las Vegas, Portland (Maine), Omaha, Syracuse and Columbia (South Carolina). Negotiations are on-going for carriage of additional public television stations. See, e.g., Comcast Comments at 8.

²⁶ Comments of Sharp Electronics Corp. at 2; Comments of Harris Corporation at 3.

have rolled out HD programming on their systems – programming that in many cases includes broadcast HD signals. Cable operators, as of March 1, 2003, offered HD in 103 markets overall. Broadcast HD programming was provided to cable customers in 43 of the 73 top-100 markets where HD was offered. In total, NCTA’s Comments showed that cable systems carried more than 124 different digital television stations. And, as NCTA’s Comments discussed, certain broadcasters’ unwillingness to permit operators to carry their HD programming explains why more broadcast digital signals have not been included among cable operators’ HD offerings.²⁷

Comcast’s Comments explain how it, along with other cable companies, “is leading the charge on many fronts to accelerate the DTV transition.”²⁸ It provides HDTV on upgraded cable systems in most of the major markets that it serves. Its HD offerings include programming from ABC, CBS, NBC, public television and several cable programmers, with the precise mix varying from market to market.²⁹ In addition to its HD services, Comcast also offers certain digital multicast services from public television stations WETA and WNET.³⁰

The record also shows how cable programmers are leading the way in providing HD programming to viewers. The Consumer Electronics Association calculates that “the weekly aggregate hours of reported cable and satellite HDTV programming is 784 hours, excluding any

²⁷ The American Cable Association’s Comments explain that a major obstacle to delivering additional digital broadcast signals is their unavailability in many smaller markets. Even if broadcasters may be transmitting in digital, “often the signal is at reduced power and does not reach cable systems serving smaller communities. Some small systems require translator stations and microwave relays to receive analog broadcast signals. Broadcasters reportedly are taking no steps to extend their DTV signal through these means.” ACA Comments at 7-8.

²⁸ Comcast Comments at 3.

²⁹ *Id.* at 6.

³⁰ *Id.* at 7 n. 17.

retransmission of broadcast digital signals. By contrast, the comparable figure for broadcast HDTV programming is only 119 hours, of which 56 hours originate with PBS.”³¹

Cable is thus leading – not hindering – the availability of HD and other digital programming to cable customers.

II. THE COMMISSION SHOULD ADOPT STATUTORY INTERPRETATIONS AND POLICIES DESIGNED TO SPEED THE TRANSITION’S END

NCTA’s Comments proposed that the Commission read the Balanced Budget Act’s 85 percent test in a reasonable manner that makes it more, not less, likely to be met. NCTA also urged the Commission to maintain its simulcasting requirement, intended to help achieve the analog spectrum’s return. Certain commenters, however, propose different interpretations and policies that, upon examination, would perpetuate the ability of and incentives for certain broadcasters to retain a second channel indefinitely.

A. The Commission Should Reasonably Interpret the 85 Percent Test

One way that households count towards meeting the 85 percent test is if they subscribe to a cable system “that carries one of the digital television service programming channels of each of the television stations broadcasting such a channel in such a market.” NCTA’s Comments proposed that “television stations” in a “market” should be construed to encompass only those stations in a market that qualify for carriage on a particular cable system under the analog must carry rules. NAB and MSTV endorse a similar approach.³²

Some broadcasters argue for more expansive cable carriage in order to reach the 85 percent threshold. For example, Sinclair Broadcast Group’s Comments assert that the statute is

³¹ CEA Comments at 10.

³² MSTV/NAB Comments at 22 (“the phrase ‘each’ would mean every local full power television station in a DMA that qualifies as a local commercial television station or noncommercial educational television station under the 1992 Cable Act.”). See also Comments of NBC and Telemundo at 7 (agreeing that “the definition of

clear on its face and “any attempt to read additional qualifications into this requirement – such as the quality of signal provided to the headend or having must carry rights – would ignore the clear, unambiguous language of the statute.”³³ WDLP Broadcasting Co., LLC claims that “each” television station in the market that broadcasts a digital signal means “each Class A or LPTV station that transmits a digital television signal.”³⁴ Paxson urges the FCC to “include all the DTV signals in its DMA, including those for which the cable system may earlier have received a market modification with respect to the stations’ analog channel.”³⁵ And it claims that “it is consistent with [protecting viewers’ access to DTV signals] to consider MVPD subscribers as part of the 85% threshold only if their service providers carry more DTV signals in a station’s DMA than are strictly required by law.”³⁶

But these commenters point to no evidence that Congress intended the digital transition to hinge on cable carriage of stations that cable customers ordinarily *would not* receive on their system. Nor do they offer any plausible reason why cable customers *should* be able to receive more broadcast stations than they do today in order for analog broadcast spectrum to be returned. The Commission should avoid the extreme reading that would permit broadcasters to retain the analog spectrum until every cable customer in the market subscribed to a cable system that carried a digital signal from every television station licensed in the market, even if that station

in-market television signals, for purposes of the DTV transition, should be limited to those stations that have a right to mandatory carriage to the household in question”).

³³ Comments of Sinclair Broadcasting Group, Inc. at 18.

³⁴ Comments of WDLP Broadcasting Co., LLC at ¶ 7.

³⁵ Comments of Paxson at 21.

³⁶ Id.

has not been carried by the system in the past and would not need to be carried in the future after the analog spectrum's return. The only point to such an interpretation would be to prolong the transition.

B. Cable Carriage of Digital Signals in Analog Should Be Counted Toward the 85 Percent Test

Several broadcasters object to the suggestion that digital broadcast signals that may be converted to analog at a cable headend should count toward fulfillment of the 85 percent test. For example, MSTV and NAB argue that the test “should be interpreted to require that viewers in a given market actually receive the undegraded digital signals of their local television stations, whether or not those signals ultimately are downconverted *at the viewer's home* for viewing on an analog set or viewed in digital format on a digital set.”³⁷ Such an interpretation would interfere with cable operators' ability to offer broadcast signals in a way that may, under certain circumstances, make the most sense for its customers, without serving any apparent purpose.

For example, a broadcast station in a market may choose to transition to digital on an accelerated schedule before other stations give back their analog spectrum. In those instances, it may make more sense to continue to offer uninterrupted service to customers of that signal in analog. FCC policy already allows this approach.³⁸ Broadcasters suggest no reason why operators' offer of this convenience to their customers fails the statutory test. That test is designed to ensure that viewers can continue to receive television programming which, in many cases, will continue to be viewed in analog.

³⁷ MSTV/NAB Comments at 20 (emphasis in original).

³⁸ Carriage of Digital Broadcast Signals, 16 FCC Rcd. at 2630.

C. The Commission Should Maintain its Simulcasting Obligation

NCTA's Comments detailed how, from the very start, the government granted broadcasters additional spectrum in which to simulcast analog programming on a digital channel. The point of the simulcasting requirement is to "help ensure that consumers will enjoy continuity of free over-the-air program service when [the FCC] reclaim[s] the analog spectrum at the conclusion of the transition. It may be difficult to terminate analog broadcast service if broadcasters show programs on their analog channels but not on their digital channels."³⁹ MSTV and NAB, along with other broadcast commenters, seek to eliminate this requirement and have the Commission consider whether to readopt it at a later date.⁴⁰ However, none of the commenters demonstrates how the transition can occur smoothly if the simulcast requirement is eliminated.

Part of the rationale of those who argue for repeal appears to be that rules are unnecessary since "broadcasters have sufficient incentives to broadcast almost all their programs, especially their most desired and important ones, in both analog and digital format...."⁴¹ But these incentives may shift as the digital transition progresses. As NCTA's Comments described, broadcast stations may have reasons, wholly apart from these incentives, to retain both their analog and digital spectrum.⁴² Thus, "to ensure that the path to the final conversion to [advanced television] is as direct and unaffected by collateral factors as

³⁹ NCTA Comments at 23 (quoting Fifth Report and Order, 12 FCC Rcd. at 12,833).

⁴⁰ MSTV/NAB Comments at 15.

⁴¹ Id. at 16.

⁴² NCTA Comments at 24.

possible,”⁴³ the rules appropriately ramp-up simulcasting obligations as the end of the transition nears.⁴⁴

PTV argues that “by requiring a simple repetition of the analog feed on the digital channel, the simulcast requirement discourages the flexible and innovative use of the digital medium, does little to drive consumer acceptance of digital television services and therefore does nothing to advance the digital transition.”⁴⁵ But the Commission already has granted digital broadcasters significant flexibility to experiment with their digital spectrum and to provide the compelling content that will drive the digital transition. PTV stations today can and do offer HD programming at the same time they offer differentiated standard definition digital fare. Thus, technological developments ensure that the simulcasting rule will not stand as an obstacle to the provision of innovative or compelling services. At the same time, the interest in return of the spectrum warrants continuation of a policy designed to protect those viewers that choose not to – or cannot afford to – take steps to gain access to these new services.

Finally, Paxson argues that simulcasting should not be required unless DTV must carry is ordered. To the extent Paxson’s real concern is the intersection between the simulcasting rule and the rule governing minimum hours of digital television operation, the Commission has already rejected its proposal.⁴⁶ In any event, other than as a matter of regulatory gamesmanship, there is no merit to tying simulcasting to digital must carry obligations.

⁴³ Memorandum Opinion and Order/Third Report and Order/Third Further Notice of Proposed Rulemaking, 7 FCC Rcd. 6924, 6976 (1992).

⁴⁴ See also Fifth Report and Order, 12 FCC Rcd. at 12,833.

⁴⁵ PTV Comments at 31.

⁴⁶ Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television, MB Docket No. 03-15 (rel. Apr. 29, 2003) (denying Paxson request).

CONCLUSION

The cable industry shares the goal of many commenters in this proceeding of ensuring a smooth digital transition for viewers. And the cable industry is doing more than its part to assist in reaching the day when the government will be able to retrieve the spectrum that it loaned each broadcaster. But mandatory dual broadcast carriage during the transition will fail to achieve either goal. It will instead disserve cable customers without in any way hastening the day when spectrum will be returned. The real issue here is how over-the-air viewers will receive broadcast DTV signals. The broadcast industry has yet to begin to address this overarching question.

Respectfully submitted,

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